

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

IN RE:)
)
MARK CHARLES CARGO and) Bankruptcy Case No. 03-92352
CINDY SUE CARGO,)
)
Debtors.)

OPINION

This matter having come before the Court on a Motion to Dismiss Pursuant to 11 U.S.C. §707(b), filed by the Office of the United States Trustee; the Court, having heard arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Title 11 U.S.C. §707(b) states:

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

A debtor's ability to significantly fund a Chapter 13 plan is the primary factor to consider in determining whether substantial abuse exists under § 707(b). In re Johnson, 115 B.R. 159 (Bankr. S.D. Ill. 1990). While the debtor's ability to significantly fund a Chapter 13 plan is a significant factor, it is not the only factor considered in a substantial abuse analysis. The Court must consider all relevant mitigating and aggravating factors in evaluating the "totality of the circumstances" present in a given consumer bankruptcy case.

See: In re Pilgrim, 135 B.R. 314 (Bankr. C.D. Ill. 1992); and In re Green, 934 F.2d 568 (4th Cir. 1991).

Among the relevant factors which the Court must consider to determine whether there is a substantial abuse under 11 U.S.C. §707(b), are the following: (1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment; (2) whether the debtor incurred cash advances and made consumer purchases far in excess of his or her ability to pay; (3) whether the debtor's proposed family budget is excessive or unreasonable; (4) whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflects his or her true financial condition; and (5) whether the petition was filed in good faith. In re Green, *supra*, at 572.

At hearing on October 16, 2003, the parties stipulated that the facts in this matter were undisputed, and that the Court could rule upon the facts presented in Debtors' bankruptcy schedules and in the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. §707(b). The parties were given a period of time to file memoranda of law and replies thereto, and the Court has had the opportunity to review those together with the record of the Debtors' bankruptcy proceeding and the Debtors' bankruptcy schedules. The only facts which the Court will consider are those which were stipulated to at hearing on October 16, 2003, as contained in the Debtors' bankruptcy schedules and the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. §707(b).

In examining the facts of this case under the guidelines set out in the relevant case law, this Court must conclude that the Motion to Dismiss Pursuant to 11 U.S.C. §707(b) filed by the United States Trustee should be allowed. Based upon the undisputed facts, the Court finds that granting relief in this case under Chapter 7 would be a substantial abuse of the Bankruptcy Code. The Court finds that the filing of the Debtors' Chapter 7 bankruptcy case was not because of sudden illness, calamity, disability, or unemployment, but, rather, was due to recurring credit card debt which the Debtors were unable to work out without the

necessity of bankruptcy. The Court also finds that the Debtors used their credit cards in excess of their ability to pay, especially in light of the fact that the Debtors admitted that the second mortgage on their home resulted from a loan obtained within two years of their Chapter 7 filing to resolve previous credit card debt. The Court concurs with the United States Trustee that the Debtors' proposed family budget is excessive, based largely upon the sizeable first mortgage payment; the large car payment on a 2003 vehicle purchased just prior to filing for bankruptcy; and contributions to a 401(k) plan.

The calculations presented to the Court by the United States Trustee reveal that, with adjustment to the Debtors' expenses, the Debtors could easily fund a Chapter 13 plan, which would provide a substantial, if not full, recovery to the Debtors' unsecured creditors. Under the facts of this case, the Court concludes that it would be an abuse of the Bankruptcy Code to discharge Debtors' unsecured debt in its entirety, which would, in essence, require the Debtors' unsecured creditors to finance Debtors' efforts to stay current on their secured debt. Under the "totality of the circumstances," the Court finds that, given the Debtors' apparent stable source of income, their eligibility for adjustments of their debts through Chapter 13, and their ability to pay a substantial portion of their unsecured debt with budget adjustment, the Motion to Dismiss Pursuant to 11 U.S.C. §707(b) must be allowed.

ENTERED: November 6, 2003.

GERALD D. FINES
Chief United States Bankruptcy Judge

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| CINDY SUE CARGO, |) | |
| |) | |
| Debtors. |) | |

ORDER

For the reasons set forth in an Opinion entered on the 6th day of November 2003;

IT IS HEREBY ORDERED that:

A. The Motion to Dismiss Pursuant to 11 U.S.C. §707(b), filed by the United States Trustee, on September 26, 2003, is ALLOWED; and,

B. The effect of this Order will be stayed for a period of 14 days, within which time the Debtors may file a motion to convert to Chapter 13, if they so desire.

ENTERED: November 6, 2003.

GERALD D. FINES
Chief United States Bankruptcy Judge

COPY OF OPINION AND ORDER SENT TO:

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DATED: November 6, 2003.

Deputy Clerk